No. 507

Office - Supreme Court, U.S.
FILED
DEC 17 1952
HAROLD B. WILLEY, Clerk

# Supreme Court of the United States

OCTOBER TERM, 1952

---

ADELE WEISS,

*Petitioner,*

against

THE UNITED STATES OF AMERICA,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

SIDNEY MOSER,
*Counsel for Petitioner.*

## INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Questions Presented | 4 |
| Specification of Errors to be Urged | 4 |
| Reasons for Granting the Writ | 4 |
| Statutes Involved | 6 |
| Conclusion | 9 |
| Appendix | 10 |


### CASES CITED


American National Bank and Trust Co. of Chicago v. United States, 7th Cir. 159 F. 2d 188, 192 ..... 6, 7

Helvering v. LeGierse, 312 U. S. 531, 539 ..... 7

Jones v. Union Central Life Ins. Co., 265 App. Div. 388; affd. 290 N. Y. 883 ..... 6

Parker v. Veterans Administration of the United States, 5th Cir., 193 F. 2d 149, 150 ..... 8

Weiss v. United States, 92 F. Supp. 322, 325; affd. 187 F. 2d 610, 612 ..... 2, 5, 8


### STATUTES


Sec. 602(f); 38 U. S. C. A. 802(f) ..... 3, 4, 6, 7

Sec. 605(a); 38 U. S. C. A. 805(a) ..... 3, 4, 6, 7

38 C. F. R., 1949 Ed. Sec. 826 ..... 8, 12

38 C. F. R., 1947 Supp. 10, 3426 ..... 8, 12, 13

Public Law 36 of the 82nd Congress ..... 8, 11

# Supreme Court of the United States

**OCTOBER TERM, 1952**

ADELE WEISS,
Petitioner,
against
THE UNITED STATES OF AMERICA,
Respondent.

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered in the above entitled case on October 29, 1952.

## Opinions Below

The opinion of the District Court (R. 34-38) is reported in 103 F. Supp. 470. The memorandum opinion of the Court of Appeals (R. 41) was not reported when this petition was filed.

## Jurisdiction

The judgment of the Court of Appeals was entered on October 29, 1952 (R. 43). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

## Statement and Questions Presented

The veteran herein is one of a class of veterans who, while in service, took out two certificates of level premium term National Service Life Insurance. The veteran died on August 27, 1948. The defendant disclaimed liability stating that the policies had lapsed on March 31, 1947 (R. 8).

When plaintiff brought the first action on March 2, 1949, she proceeded under the mistake of fact that the policies

had lapsed (Comp. par. 9, R. 21), and alleged, as the Court below stated in *Weiss* v. *U. S.*, 187 F. 2d 610, 611:

> "* * * for the keeping in force of the insurance she relies upon (1) the existence of an insurance reserve based upon unearned premiums * * * sufficient and effective for the purpose * * *."

Plaintiff's complaint was dismissed for failure to state a claim without prejudice to plaintiff "* * * showing a different application or availability of such portion of the Fund to the payment of unpaid premiums * * *" (92 F. Supp. 322, 325); reargument was denied; motion to amend denied and a motion to compel the defendant to sell or supply plaintiff with all regulations was also denied (92 F. Supp. 322, 325; aff'd 187 F. 2d 610; cert. den. 342 U. S. 820; rehearing denied 342 U. S. 874; second rehearing den. 72 S. Ct. 357).

Subsequent to the commencement of the first action the defendant made public for the first time certain facts which indicated that the aforesaid "* * * insurance reserve based upon unearned premiums * * *" had been charged with the veteran's contributive and/or distributive share of the liabilities that were charged against the N.S.L.I. Fund until the death of these veterans (Comp. pars. 17, 18, R. 22, 23) with the result that this class of veterans paid the same contribution until the dates of their death as all the other policyholders of the same age, class and equal expectation of life (Comp. par. 23, R. 23, 10), and paid all the premiums required pursuant to the terms of a contract issued on a mutual basis (Comp. par. 24, R. 24). That the aforesaid reserve was more than sufficient to pay the total gross flexible premiums until the veteran's death (Comp. pars. 12, 13, R. 21, 22).

On November 26, 1951, plaintiff brought the instant action for relief pursuant to Rule 60b[1] and pursuant to

[1] Federal Rule 60b; Relief from Civil Judgments, 61 Yale Law Journal 76, 80.

Rule 18 for the proceeds of these certificates. A motion to direct defendant to answer requests for admissions and an interrogatory was made returnable on March 5, 1952 (R. 18). Defendant thereafter moved for summary judgment returnable the same day (R. 5). Plaintiff, in her affidavit in opposition, incorporated by reference the answers to the requests for admissions and the interrogatory as "* * * facts essential to justify his opposition * * *" Rule 56(f) (R. 8, 13). The District Court granted defendant's motion for summary judgment and thereafter denied the motion to direct the defendant to answer (R. 4, 17). On appeal from these orders the Court below affirmed on the opinion of the District Court (R. 41, 42).

The Court below stated (R. 38):

> "What is important and necessary for the plaintiff to support her claim, as indicated by the Court of Appeals, is to show some statute, or regulatory basis within the framework of the statute, for the right to look to some insurance reserve to remedy the failure to pay required premiums; how or why a reserve was allowed to accumulate by the Government is not material here."

The facts disclosed subsequent to the first action now indicate that unless the provision of Sec. 602(f) of the Act[1] granting "* * * extended values * * *" was applicable to the aforesaid reserve, these veterans would be compelled to adhere to their obligation of Sec. 605(a) of the Act[2] which provided that their premiums, while part of the Fund until dividends were declared "* * * shall be available for the payment of liabilities under such insurance * * *" and thus pay their contributive share of the liabilities that were charged against the Fund and pay the same contribution that was charged to all the other policyholders of the same age, class and equal expecta-

[1] Appendix, pp. 10, 11, Petition, p. 6.

[2] Petition, p. 6.

tion of life until the dates of their death, and/or until dividends were declared without receiving anything in return for their contribution (R. 9, 10).

**The Questions Therefore Presented Are:**

(1) Should the Act be so construed as to take property without due process when it can be construed in a constitutional manner by granting the provision of Sec. 602(f) of the Act as to "* * * extended values * * *" to these policyholders?

(2) Where the provisions of Sec. 602(f) and 605(a) of the Act and the new facts conclusively indicate the inapplicability of the regulations which provide that dividends shall be paid in cash with the result that the defendant has no defense to the instant claim pursuant to Rule 60(b), may the defendant now invoke the former judgment as an escape from facing squarely the real questions herein?

**Specification of Errors to be Urged:**

(1) In holding that the certificates had lapsed.

(2) In affirming the order granting defendant's motion for summary judgment, the order denying a motion to strike out the defense of res judicata, and the order denying plaintiff's motion to direct the defendant to answer requests for admissions and an interrogatory when these answers were incorporated in the affidavit in opposition as "* * * facts essential to justify his opposition * * *" pursuant to Rule 56(f) (R. 8, 11, 13).

**Reasons for Granting the Writ**

The present facts indicate that there was a mutual mistake of fact when this class of veterans were advised that their policies had lapsed.

In the former case the Court below stated (187 F. 2d 610, 612):

> "* * * she is not relying upon declared and accumulated dividends, but rather upon the Administrator's breach of duty in failing to declare dividends. Her contention is that there had been built up in the * * * Fund a reserve on these certificates on the basis of premiums paid in which, not having been declared as dividends, must now be treated as applicable upon these certificates to render them fully paid up policies for a period beyond the time of the death of the insured * * * there may perhaps be some fireside equity in the concept that instead of cash payments available now the money should have been used to keep the main policies alive so long as possible * * *."

The present facts indicate that this money had "* * * been used to keep the main policies alive * * *."

The Court below stated (R. 36, 37):

> "Plaintiff's pending complaint alleges that the declaration of dividends in January, 1950, including dividends upon premiums paid to March, 1947, by Eugene Morse, indicates the existence of a reserve prior to the declaration; that this reserve was 'charged toward the payment of liabilities' under the National Service Life Insurance Fund; that the credits due to Eugene Morse out of the premiums he had paid prior to March 31, 1947, were used by the defendant in paying his 'distributive and/or contributive share' of the liabilities charged to the Fund; that by reason of such credit being subject to the 'risk and/or liability' of the Fund, a 'vested' right was created which became fixed upon the veteran's death; and, therefore, that there was a 'vested property right' in the veteran to receive the full value of the policies, since the credits to which he was entitled exceeded the amount of the premiums he was required to pay between March 31, 1947 and his death on August 27, 1948. It is also alleged that the attempt to return part of the excess payment of premiums at a subsequent date in the form of dividends could not take away this 'vested' right."

## Statutes Involved

Sec. 605(a) of the Act, 38 U. S. C. A., Sec. 805(a), provides:

> "There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments from this fund shall be made upon and in accordance with awards by the Administrator."

Sec. 602(f) of the Act, 38 U. S. C. A. 802(f)[1] states in part:

> "Provisions for cash, loan, paid up, and extended values, dividends from gains and savings refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator."

This is an insurance contract, not a banking contract. The Government, having accepted the veteran's premiums for insurance equal to the face value of the policies, became obligated both by contract and pursuant to Sec. 605(a) of the Act to give these veterans such insurance while their premiums remained in their status and were part of the Fund until dividends were declared. These veterans, having died before dividends were declared and while their premiums were still in the status of premiums and still in the Fund, the rights of the parties became fixed and vested. (*Jones* v. *Union Central Life Ins. Co.*, 265 App. Div. 388, aff'd 290 N. Y. 883; *American National Bank and*

[1] Appendix, pp. 10, 11.

*Trust Co. of Chicago* v. *United States,* 7th Cir. 159 F. 2d 188, 192). This mutual obligation that the premiums while in the Fund and until dividends were declared " * * * shall be available for the payment of liabilities under such insurance, * * * " (Sec. 605(a)) became a vested property right. Once dividends were declared, this reserve was withdrawn from the Fund and allocated to dividends. But until dividends were declared this mutual obligation continued. Had dividends been declared before the death of these veterans, they would not have been compelled to pay their contributive share of the liabilities that were charged against the Fund until their death. The defendant's very act in applying the provision of Sec. 605(a) of the Act to this reserve to pay the veterans' contributive share of the liabilities that were charged against the Fund until dividends were declared " * * * recognized that the policyholder had the power to prepay it to the extent of the money in its possession" (Comp. par. 22, R. 23).

The present facts indicate that the risk to pay for the liabilities that were charged against the Fund is now placed upon these veterans who had money on deposit to their credit in the Fund without any risk on the part of the Government. The only way that there can be a mutuality of risk and for the Administrator to avoid the taking of property without due process would be to grant the provision of Sec. 602(f) of the Act as to " * * * extended values * * * " to these policyholders.

The foregoing explains why Congress did not limit the applicability of this provision to any particular plans of insurance.

Applying the definition of insurance as "Risk-distribution" (*Helvering* v. *LeGierse,* 312 U. S. 531, 539) and "Equality of Risk", these veterans were never required to pay a higher premium than their contributive share of the liabilities that were charged against the Fund until their death. Thus, if the mortality table used or the plan (converted policies) require higher premiums, the unearned premiums and the reserve is proportionately in-

creased but the veteran is never liable for more than his contributive share.

Two of the regulations sustained as a defense in the former action (187 F. 2d 610, 612; 38 C. F. R., 1949 Ed. Sec. 826[1] and 38 C. F. R., 1947, Supp. 10, 3426)[2] now support plaintiff's claim as they indicate a "* * * regulatory basis within the framework of the statute, for the right to look to some insurance reserve to remedy the failure to pay required premiums; * * *"[3] in that they both provide "* * * will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance * * *" and as plaintiff does not predicate her claim on dividends the regulations which require that dividends shall be paid in cash do not apply to the present facts; further, Public Law 36 of the 82nd Congress, effective January 1, 1952, erased the aforesaid regulations which provided that dividends shall be paid in cash without the written consent of the veteran.[4]

The case of *Parker* v. *Veterans Administration of the United States*, 5 Cir.; 193 F. 2d 149, creates a conflict in fact and reasoning with the opinion of the Court below in the instant case. In the *Parker* case the Court stated (150):

> "* * * it was contended that the premium paid by her son constituted an 'overcharge' in the amount of the dividend accruing to the insured, * * *."
>
> * * * * * *
>
> "* * * Upon the trial the judge concluded as a matter of law that there was no overcharge, * * *. The appellant here insists that this is wrong, and that since there was owed the soldier an overcharge greater than the amount needed to pay the premiums the indebtedness represented service pay due and should be applied to accomplish such payment. * * * The argument of the

[1] Appendix, p. 12.

[2] Appendix, pp. 12, 13.

[3] Opinion of Court below (R. 38).

[4] Appendix, p. 11.

appellant overlooks the point that the premium paid by the deduction from the service pay was the proper and regular charge for the premium due upon the insurance. When so employed the money no longer possessed any element of service pay, but instead was the payment of insurance premiums by the insured. Consequently, the rights of the beneficiary must be determined as a matter of insurance * * *."

## CONCLUSION

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

Respectfully submitted,

SIDNEY MORSE,
Counsel for Petitioner.

## APPENDIX

### Sec. 602(f) (38 U. S. C. A. 802(f))

Act of Oct. 8, 1940, as amended by sec. 3, Public Law 589, 79th Cong. Aug. 1, 1946, by sec. 2, Public Law 5, 80th Cong., Feb. 21, 1947, and by Public Law 838, 80th Cong., June 29, 1948.

(f) Such insurance may be issued on the following plans: Five-year level premium term,[16] ordinary life, twenty-payment life, thirty-payment life, twenty-year endowment, endowment at age sixty, and endowment at age sixty-five. Level premium term insurance may be converted as of the date when any premium becomes or has become due, or exchanged as of the date of the original policy, upon payment of the difference in reserve, at any time while such insurance is in force and within the term period to any of the foregoing permanent plans of insurance, except that conversion to an endowment plan may not be made while the insured is totally disabled. All level premium term policies, except as provided below, shall cease and terminate at the expiration of the term period: *Provided,* That at the expiration of the term period any national service life insurance policy which was issued on a five-year level premium term plan before January 1, 1948, and which has not been exchanged or converted to a permanent plan of insurance, may be renewed as level premium term insurance for an additional period of five years at the premium rate for the then attained age without medical examination, provided, the required premiums are tendered prior to the expiration of the first term period: *Provided further,* That in any case in which the insured is shown by evidence satisfactory to the Administrator to be totally disabled at the expira-

[16] The 5-year term policies issued prior to December 31, 1945, were extended for an additional period of 3 years. (See appendix, Public Law 118, 79th Cong.)

tion of the level premium term period of his insurance under conditions which would entitle him to continued insurance protection but for such expiration, such insurance, if subject to renewal under this provision, shall be automatically renewed for an additional period of five years at the premium rate for the then attained age, unless the insured has elected insurance on some other available plan. Provision for cash, loan, paid-up, and extended values, dividends from gains and savings refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator.

**Public Law 36—82d Congress, Chapter 94—1st Session**
**H. R. 321**

AN ACT

To provide that on and after January 1, 1952, dividends on national service life insurance shall be applied in payment of premiums unless the insured has requested payment of dividends in cash.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 602(f) of the National Service Life Insurance Act of 1940, as amended, is hereby amended by substituting a colon for the period at the end thereof and adding the following: "*Provided further,* That until and unless the Veterans' Administration has received from the insured a request in writing for payment in cash, any dividend accumulations and unpaid dividends shall be applied in payment of premiums becoming due on insurance subsequent to the date the dividend is payable after January 1, 1952."

Approved May 18, 1951.

**38 C. F. R. 8.26 F. R. Sept. 16, 1948, p. 5399, Vol. 13, No. 181**

Sec. 8.26 DIVIDENDS. A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' affairs. Any such dividend shall be paid in cash except that at the written request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Payment of dividends shall be without interest except when left to accumulate on deposit in accordance with the insured's written request. Interest on dividend accumulations will be credited annually at such rate as the Administrator may determine. Dividend accumulations and unpaid dividends shall not be available for the payment of insurance premiums except at the written request of the insured made before default in payment of a premium. Any unpaid dividend on a lapsed policy will be paid in cash to the insured, if living, otherwise to his estate. Dividend accumulations will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid up insurance as provided in Sections 8.29(a) and 8.30 respectively. Upon maturity of the policy, any dividend accumulations not previously withdrawn and any unpaid dividends will be payable in cash to the person currently entitled to receive payments under the policy.

**F. R. April 1, 1947, page 2129, Vol. 12, No. 64**

Sec. 10.3426 DIVIDENDS. A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' Affairs. Dividends will be paid in cash except that at the request of the insured they may be left to accumulate on deposit provided the policy is in force

on a basis other than extended term insurance or level premium term insurance. Interest on dividend accumulations will be credited annually at such rate as the Administrator of Veterans' Affairs may determine. Dividend accumulations shall not be available for the payment of insurance premiums, but will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in Secs. 10.3429 and 10.3430, respectively. Any dividend accumulations not previously withdrawn will be payable at the maturity of the policy to the person entitled to its proceeds.

(Secs. 601-618, 54 Stat. 1008-1014; 38 U. S. C. 801-818.)

## INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statutes and regulations involved | 2 |
| Statement | 3 |
| Argument | 5 |
| Conclusion | 13 |
| Appendix | 14 |

Cases:

| | |
|---|---|
| *Chicot County Drainage District* v. *Baxter State Bank, et al.*, 308 U. S. 371 | 13 |
| *Jones* v. *United States*, 189 F. 2d 601 | 5 |
| *Lynch* v. *United States*, 292 U.S. 571 | 7 |
| *Parker* v. *Veterans Administration of United States*, 193 F. 2d 149 | 5, 11 |
| *Southern Pacific Railroad Co.* v. *United States*, 168 U. S. 1 | 13 |
| *United States* v. *Huie*, 73 F. 2d 305 | 10 |
| *United States* v. *Munsingwear*, 340 U. S. 36 | 13 |
| *Weiss* v. *United States*, 92 Fed. Supp. 322, affirmed, 187 F. 2d 610, certiorari denied, 342 U. S. 820, rehearing denied, 342 U. S. 874, motion for leave to file a second petition for rehearing denied, 342 U. S. 915 | 4, 12 |
| *White* v. *United States*, 270 U. S. 175 | 7 |

Statutes and regulations:

| | |
|---|---|
| Act of May 18, 1951, c. 94, 65 Stat. 44 | 8 |
| National Service Life Insurance Act, 54 Stat. 1008, as amended, 60 Stat. 782, 62 Stat. 1109, 38 U.S.C. 801 *et seq.*: | |
| Section 602(f) | 7, 8, 11, 14 |
| Section 602(o) | 7 |
| Section 605(a) | 7, 8, 15 |
| Section 608 | 6, 15 |

Regulations of the Veterans Administration:

| | |
|---|---|
| 38 C.F.R. (1941 Supp.; 6 F.R. 1163): | |
| Sec. 10.3414 | 6 |
| Sec. 10.3416 | 6 |
| 38 C.F.R. (1947 Supp.): | |
| Sec. 10.3426 | 10, 16 |
| Sec. 10.3429 | 10 |
| 38 C.F.R. (1949): | |
| Sec. 8.14 | 6 |
| Sec. 8.16 | 6, 16 |
| Sec. 8.26 (13 F.R. 5399) | 10 |
| Sec. 8.108 | 7 |
| 38 C.F.R. (1949 Supp.): | |
| Sec. 8.26a | 9, 17 |

# In the Supreme Court of the United States

OCTOBER TERM, 1952

---

No. 507

---

ADELE WEISS, *Petitioner*

v.

UNITED STATES OF AMERICA

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 34-38) is reported at 103 F. Supp. 470. The *per curiam* opinion of the United States Court of Appeals for the Second Circuit (R. 41) is reported at 199 F. 2d 454.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1952 (R. 42). The petition for a writ of certiorari was filed on December 17, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTION PRESENTED

Whether the National Service Life Insurance Act, or the administrative regulations promulgated pursuant thereto, required the use of monies in the National Service Life Insurance Fund to avoid a lapse in policies of level-premium, term National Service Life Insurance where (a) the insured veteran failed to pay premiums on the policies for 17 months prior to his death in August 1948 and (b) in 1950 the Veterans Administration declared a special dividend, the insured's share of which was larger than the sum of the unpaid premiums required to keep the insurance in force during his lifetime.

## STATUTES AND REGULATIONS INVOLVED

The relevant portions of Sections 602(f), 605(a) and 608 of the National Service Life Insurance Act (54 Stat. 1008, as amended, 60 Stat. 782, 62 Stat. 1109, 38 U.S.C. 802(f), 805(a), 808) and of the Regulations of the Veterans Administration (38 C.F.R. (1949), § 8.16; 38 C.F.R. (1947 Supp.) § 10.3426; 38 C.F.R. (1949 Supp.) § 8.26a are set forth in the Appendix, *infra*, pp. 14-17.

**STATEMENT**

This is the second action brought by petitioner to recover the proceeds of two National Service Life Insurance policies. The courts below were of the view that the decision of the Court of Appeals on the occasion of the first suit, from which a petition for a writ of certiorari was denied by this Court, controls the disposition of the present litigation. The background and undisputed facts of the controversy are as follows:

Petitioner was named as beneficiary in two certificates of level-premium, term National Service Life Insurance, each for $5,000, taken out by her brother, Eugene Morse, while he was serving in the Armed Forces of the United States (R. 20, 21, 25). The veteran was honorably discharged on December 7, 1945, and died on August 27, 1948 (R. 20). No premiums were paid on the insurance subsequent to March 31, 1947, a date approximately seventeen months prior to the veteran's death, August 27, 1948 (R. 6, 7).

On March 2, 1949, petitioner filed an action in the United States District Court for the Eastern District of New York. While conceding that there had been a non-payment of premiums after March 31, 1947, petitioner sought to avoid its effect by contending *inter alia* that at the time the veteran made his last premium payment the policies had a reserve, based upon unearned premiums or undeclared dividends, in excess of the amount necessary

to cover the unpaid premiums and that, by reason of the Government's failure to declare dividends during his lifetime, the reserve must be treated as having been applicable to keep the policies in force beyond the date of the veteran's death (R. 9). The United States moved to dismiss the complaint for failure to state a cause of action and the District Court granted the motion. *Weiss* v. *United States,* 92 F. Supp. 322. The Court of Appeals affirmed, 187 F. 2d 610 (C.A. 2) and certiorari was denied, 342 U. S. 820, rehearing denied, 342 U. S. 874 (November 5, 1951), motion for leave to file a second petition for rehearing denied, 342 U. S. 915 (January 14, 1952).

On November 26, 1951, petitioner filed a second complaint in the District Court. Making no reference to the payment or non-payment of premiums after March 1947, this complaint alleged that the declaration of dividends on policies of National Service Life Insurance by the Veterans' Administrator in January 1950 demonstrated that the veteran had an interest in the National Service Life Insurance Fund sufficient to pay the premiums required to keep the policies in force through the date of his death, and that consequently the policies had not lapsed in the first instance (R. 20-26). The United States moved for summary judgment on the ground that the policies had lapsed prior to the veteran's death for non-payment of premiums after March 31, 1947, and that the issues raised by petitioner were *res judicata* by virtue of the for-

mer suit (R. 5-7). Summary judgment was granted (R. 34-38) and the Court of Appeals affirmed *per curiam* (R. 41) on the District Court opinion and on the authority of its prior decision and similar holdings in other Circuits, *Jones* v. *United States,* 189 F. 2d 601 (C.A. 8); *Parker* v. *Veterans Administration of United States,* 193 F. 2d 149 (C.A. 5).

## ARGUMENT

This action represents petitioner's second attempt to overcome the defense that the veteran failed to make premium payments on his level-premium, term National Service Life Insurance for a period of seventeen months prior to his death. While her present theory is phrased in somewhat different terms, it rests upon the same proposition that was rejected by the courts below on the occasion of the first suit—namely, that the policies had a reserve at the time the veteran made his last payment in March 1947, which could have been applied to keep them in force until the date of the veteran's death. Contrary to petitioner's contention, nothing has transpired since the commencement of the first action to render inapplicable the clearly correct decision of the Court of Appeals on the earlier appeal or the decisions of the Eighth and Fifth Circuits in the *Jones* and *Parker* cases, *supra,* which are in accord.[1] We submit that the District

[1] See fn. 6, *infra,* pp. 11, 12.

Court's observation that petitioner has had her day in court is an accurate appraisal of the situation and that, in all the circumstances, further review by this Court is not warranted.

1. Petitioner seeks to justify the instant suit on the ground that in January 1950, some ten months after the commencement of the prior action but prior to its disposition on appeal, the Veterans' Administrator declared a dividend on policies of National Service Life Insurance, including the policies in issue, based upon the premiums paid. This fact may indicate that when the last premium payment was made in March 1947 the veteran possessed some form of interest in the National Service Life Insurance Fund. But it hardly follows, as petitioner urges here, that the policies did not lapse, before the veteran's death, for non-payment of premiums. The Administrator has provided by regulation that upon the failure to pay a due premium within a 31 day grace period the policy shall cease and become void, except as otherwise provided in the policy. 38 C.F.R. (1949), §§ 8.14, 8.16.[2] Petitioner does not, and cannot justifiably, challenge the validity of this provision.[3] And noth-

[2] These regulations were promulgated, in their present form, on February 25, 1941. 6 F.R. 1163, 38 C.F.R. (1941 Supp.), §§ 10.3414, 10.3416.

[3] By Section 608 of the Act, 38 U.S.C. § 808, the Administrator is authorized to promulgate "such rules and regulations, not inconsistent with the provisions of this part, as are necessary or appropriate to carry out its purposes • • •"

ing in the certificates in issue renders it inapplicable.[4] The question thus is, as on the first appeal, whether the National Service Life Insurance Act, or other administrative regulations, give an insured veteran the right to have his interest in the Fund, if any, applied to remedy the failure to pay the premiums on the insurance.

Petitioner places reliance on the provisions of Sections 602(f) and 605(a) of the Act. But it is perfectly plain that neither of these sections required, even if they can be construed to have authorized, the use of monies in the Fund to avoid a lapse of this veteran's policies upon his default in the payment of stipulated premiums. Section 602(f) provided in pertinent part, in March 1947, as well as at the time of the veteran's death, that:

> * * * Provisions for cash, loan, paid-up, and extended values, dividends from gains and

---

[4] The certificates, which were issued in each case in lieu of the policy, as authorized by Section 602(o) of the Act, 38 U.S.C. 802(o), provided:

> Subject to the payment of the premiums required, this insurance is granted under the authority of the National Service Life Insurance Act of 1940, and subject in all respects to the provisions of such Act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of this Act, shall constitute the contract.

Cf. 38 C.F.R. (1949), § 8.108; *Lynch* v. *United States*, 292 U. S. 571, 577; *White* v. *United States*, 270 U. S. 175, 180.

> savings, refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance from time to time by regulations promulgated by the Administrator.

In 1951, it was amended (Act of May 18, 1951 c. 94, 65 Stat. 44) to include the following:

> *Provided further,* That until and unless the Veterans' Administration has received from the insured a request in writing for payment in cash, any dividend accumulations and unpaid dividends shall be applied in payment of premiums becoming due on insurance subsequent to the date the dividend is payable after January 1, 1952.

But this proviso, in terms, is not applicable here, and in addition does not improve the position of a veteran who fails to pay premiums before the dividend is declared.

Section 605(a) provides:

> There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund,

> which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. *Payments from this fund shall be made upon and in accordance with awards by the Administrator.* [Emphasis supplied.]

Thus, the statute expressly grants wide discretion to the Administrator insofar as the provision for extended values and the employment of the Fund are concerned.

As petitioner tacitly admits, the Administrator in exercising this discretion has not provided for the application of the insurance reserve in the manner advocated by her. On the contrary, the Administrator determined, prior to the declaration of the special dividend in 1950, that "any special National Service life insurance dividend that may be declared shall be paid in cash only" and "unpaid special dividends shall not be available to pay premiums". 38 C.F.R. (1949 Supp.), Section 8.26a. And the regulations in effect at the time of the default in premium payments (i.e., March 1947) decreed that only in the case of policies in force on *other than a term basis* could dividends be left on deposit and used to provide extended insur-

ance, and then only at the veteran's request. 38 C.F.R. (1947 Supp.) 10.3426.[5]

In these circumstances, petitioner is forced to the position that although in 1947 the veteran possessed merely an inchoate right to receive dividends when and if declared out of the monies in the Fund (cf. *United States* v. *Huie*, 73 F. 2d 305 (C.A. 5)), and although the dividends, upon their subsequent declaration, could not be applied retroactively to keep the policies in force, the Government was nevertheless somehow obligated to use the Fund to remedy the failure of the veteran to pay premiums himself. This nebulous theory cannot be supported. There is clearly no substance to petitioner's assertion (Pet. 7) that, unless Section

---

[5] Section 10.3426 (Appendix, *infra*, pp. 16-17), promulgated March 31, 1947, should be read in conjunction with 38 C.F.R. § 10.3429, July 31, 1947, which provides:

> After the expiration of the first policy year and upon default in the payment of a premium within the grace period, if a National Service Life Insurance policy *on any plan other than five-year level premium term* has not been surrendered for cash or for paid-up insurance, the policy shall be extended automatically as term insurance for an amount of insurance equal to the face value of the policy less any indebtedness for such time from the due date of the premium in default as the cash value less any indebtedness will purchase when applied as a net single premium at the attained age of the insured. * * * [Emphasis supplied]

And while Section 10.3426 was amended on September 15, 1948 (13 F.R. 5399, 38 C.F.R. (1949), § 8.26), the changes are not material here.

602(f) of the Act be interpreted so as to require the Administrator to make provision for extended values in the case of term insurance, the insured veteran's property is taken without due process of law. This veteran's contract with the Government, pursuant to which he made premium payments up until March 1947, was expressly made subject to the payment of premiums required (see fn. 4, p. 7, *supra*) and did not contain provisions for extended insurance. Had the veteran desired to do so, he could have converted his term insurance, in accordance with Section 602(f) of the Act, into one of the forms containing extended insurance provisions, simply by making application and paying a higher premium. He did not exercise this right and it can therefore be presumed that he was content with the terms of the insurance he initially purchased. In any event, it is hardly violative of due process to enforce these terms.[6]

---

[6] Moreover, it is reasonable to suppose that had the 1950 special dividend been insufficient to pay for the insurance from March 1947 to August 1948, petitioner would have regarded as a deprivation of property without due process of law any determination by the Administrator that payment of the dividend was not forthcoming because the veteran's interest in the National Service Life Insurance Fund was employed to keep the policies in effect as long as possible.

Petitioner's assertion that the decision below is in conflict with *Parker* v. *Veterans Administration of United States*, 193 F. 2d 149 (C.A. 5) is equally unmeritorious. There, the contention was made, in circumstances not unlike those present in the instant case, that the declaration of the 1950 special dividend indicated a premium "overcharge" which should have been used to avoid a lapse of the policy. The court, in re-

2. Quite apart from the lack of merit to petitioner's contentions, it is clear, as the District Court noted, that they were rejected by the Court of Appeals on the earlier appeal. After a recitation of the statutory provisions and administrative regulations referred to above, the Court of Appeals said (187 F. 2d at 612):

> [Petitioner's] contention is that there had been built up in the National Service Life Insurance Fund a reserve on these certificates on the basis of premiums paid in which, not having been declared as dividends, must now be treated as applicable upon these certificates to render them fully paid-up policies for a period beyond the time of the death of the insured. This theory appears to have been developed because of the Administrator's present program of paying certain dividends in cash upon all policies, even those which had lapsed. In view of this there may perhaps be some fireside equity in the concept that instead of cash payments available now the money should have been used to keep the main policies alive so long as possible. Be that as it

---

jecting this contention, said (193 F. 2d at 150): "We are pointed to no statutory provision or regulation which permits the use of a dividend declared in 1950 to continue the coverage of insurance which lapsed in 1945. On the contrary, this means of keeping the policy in force appears definitely foreclosed." The *Parker* decision plainly accords with the decision below.

> may, we do not see how that can be made a compulsion upon the government when the regulations under the statute, having the force of law because quite consistent with it, are so obviously based on the contrary principle. *Provisions as to lapse are necessary if the scheme of requiring premiums from the veterans for their insurance is to be given any force at all.* [Emphasis supplied.]

Accordingly, under well settled principles laid down by this Court, the matter became *res judicata* upon the denial of certiorari (*Southern Pacific Railroad Co.* v. *United States,* 168 U. S. 1; *United States* v. *Munsingwear,* 340 U. S. 36; *Chicot County Drainage District* v. *Baxter State Bank, et al.,* 308 U. S. 371) and petitioner cannot now revive it by the device of rephrasing her complaint.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER J. CUMMINGS, JR.,
*Solicitor General.*

HOLMES BALDRIDGE,
*Assistant Attorney General.*

SAMUEL D. SLADE,
ALAN S. ROSENTHAL,
*Attorneys.*

JANUARY, 1953

## APPENDIX

1. The pertinent provisions of the National Service Life Insurance Act, 54 Stat. 1008, as amended, 60 Stat. 782, 62 Stat. 1109, 38 U.S.C. 801 *et seq.*, are as follows:

> Sec. 602(f). Such insurance may be issued on the following plans: Five-year level premium term, ordinary life, twenty-payment life, thirty-payment life, twenty-year endowment, endowment at age sixty, and endowment at age sixty-five. Level premium term insurance may be converted as of the date when any premium becomes or has become due, or exchanged as of the date of the original policy, upon payment of the difference in reserve, at any time while such insurance is in force and within the term period to any of the foregoing permanent plans of insurance, except that conversion to an endowment plan may not be made while the insured is totally disabled. All level premium term policies, except as provided below, shall cease and terminate at the expiration of the term period: *Provided,* That at the expiration of any term period any national service life insurance policy which was issued on a five-year level premium term plan before January 1, 1948, and which has not been exchanged or converted to a permanent plan of insurance, may be renewed as level premium term insurance for an addi-

tional period of five years at the premium rate for the then attained age without medical examination, provided the required premiums are tendered prior to the expiration of the first term period: *Provided further,* * * * Provisions for cash, loan, paid-up, and extended values, dividends from gains and savings refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance from time to time by regulations promulgated by the Administrator.

Sec. 605(a). There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments from this fund shall be made upon and in accordance with awards by the Administrator.

Sec. 608. The Administrator, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, shall have power to make such

rules and regulations, not inconsistent with the provisions of this Act, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. * * *

2. The pertinent Regulations of the Veterans Administration are as follows:

(a) 38 C.F.R. (1949) § 8.16. *Lapse for nonpayment of premium.* If any premium be not paid when due, the National Service life insurance policy shall cease and become void, except as otherwise provided in the policy.

(b) 38 C.F.R. (1947 Supp.) § 10.3426. *Dividends.* A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' Affairs. Dividends will be paid in cash except that at the request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Interest on dividend accumulations will be credited annually at such rate as the Administrator of Veterans' Affairs may determine. Dividend accumulations shall not be available for the payment of insurance premiums, but will be used in addition to the reserve on the policy for the purpose of com-

puting the period of extended term insurance or the amount of paid-up insurance as provided in §§ 10.3429 and 10.3430, respectively. Any dividend accumulations not previously withdrawn will be payable at the maturity of the policy to the person entitled to its proceeds.

(c) 38 C.F.R. (1949 Supp.) § 8.26a. *Special dividends.* Any special National Service life insurance dividend that may be declared shall be paid in cash only. Such special dividends shall not be accepted to accumulate on deposit. Unpaid special dividends shall not be available to pay premiums.

☆U. S. GOVERNMENT PRINTING OFFICE 1953—238241/P.O. 997